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Supreme Court, U.S.
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No. 95-1219

IN THE

Supreme Court of the United States

October Term, 1995

GEORGE NEWMAN,

Petitioner,

vs.

CONSOLIDATION COAL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. IS THERE AN EXCEPTION TO THE "CLEAR AND INDISPUTABLE" REQUIREMENT WHEN MANDAMUS IS SOUGHT TO PROTECT A RIGHT TO JURY TRIAL?

II. IS A SEAMAN WHO PROPERLY DEMANDS A JURY TRIAL IN HIS JONES ACT CLAIM IN THE SHIPOWNER'S NONCONCURSUS ADMIRALTY ACTION TO LIMIT OR EXONERATE ITSELF FROM ITS LIABILITY ENTITLED TO A JURY TRIAL?

III. IS RESPONDENT'S RECITAL OF THE EXPRESS TERMS OF THE SEAMAN'S STIPULATION FALSE?

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SUPPLEMENTAL STATEMENT OF THE CASE

Mr. Newman has sought throughout this case only to preserve his rights to a jury trial, ideally by not having the facts found by the state court jury reexamined or, alternatively, if there is to be such a reexamination, that it be done by a jury as he demanded. Respondent's Brief in Opposition does not contend Mr. Newman failed to properly demand a jury trial. Newman told the district court:

> MR. HAMMER: Well, I think, Your Honor, to protect Mr. Newman's rights under the Seventh Amendment, that to decide this case, Mr. Newman is entitled to have those jury findings given weight by this Court.

(Appendix A53). He freely acknowledged he was not imposing the defense of res judicata.

> Mr. Hammer: No, Your Honor. We stipulated that we would not invoke res judicata.

(Appendix A52). Newman has *not* asked the lower court to preclude Consol from litigating its case on the basis of res judicata (*Id.*) and did not ask the Court of Appeals or this Court to bar it from litigating its claim to exoneration or limited liability based on that defense. (Page 29 Petition For Certiorari, Conclusion). Newman's references to the facts and the law of this case were and are required to demonstrate the materiality and importance of those facts in this proceeding.

Newman specifically invoked his constitutional right to a jury trial at all times. He demanded a jury trial from his first appearance in this case (Appendix A45) and the docket was so marked (Docket Entries, Appendix A12). That demand was never withdrawn and Consol has furnished no reference to the record indicating such withdrawal. Paragraph ten of Petitioner's Motion to the

lower court to Vacate and Dissolve the Injunction and to Stay specifically and expressly stated his constitutional right to a jury trial:

> 10. Mr. and Mrs. Newman, on the other hand, will be severely prejudiced if the Injunction remains in effect because they will be deprived of their right to prosecute this Case in State Court granted to them by Congress in the Savings to Suitors clause, 28 U.S.C.A. §1333 (Suitors in Admiralty are entitled to a common law remedy where the common law is competent to give it). *Mr. and Mrs. Newman will further be severely prejudiced if their Motion is not granted because they will be deprived of their right to a jury trial granted to them by the Constitution of the United States of America.*

(Paragraph 10, Appendix A48) (Emphasis added)

Mr. Newman stipulated only to three things: to waive res judicata, Consol has the right to litigate its issues and the valuation of the limitation fund is to be resolved by the district court (Appendix A50). That stipulation neither expressly nor impliedly waived Mr. Newman's right to jury trial. (*Id.*) The district court granted Mr. Newman's Motion to Vacate or Dissolve the Injunction and Stay and his included expressed right to jury trial in state court in its Order of February 1, 1991 (Appendix A10-11). The consequent jury verdict in Answers to Special Interrogatories is reproduced in Appendix A31-32 and was affirmed on appeal.

Consol has *not* argued to the district court, the Court of Appeals or this court, that the state trial and appellate courts unfairly prevented it from litigating the jury trial.

REASONS FOR GRANTING THE WRIT

I. This Case Seeking To Protect The Right To Trial By Jury Is An Exception To The "Clear And Indisputable" Requirement of Mandamus.

Consol's argument (Brief in Opposition, pp. 8-9) that mandamus is unavailable here does not discuss the exception to the "clear and indisputable" rule when the right to jury trial is at stake. (Petition For Certiorari, pp. 5-7). At least three circuit courts of appeals have held that the "clear and indisputable" requirement does not apply to mandamus actions involving the right to jury trial: *Wilmington Trust v. U.S. Dist. Court for D. Hawaii*, 934 F.2d 1026 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992) (admiralty case); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996) citing *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) *cert. denied*, _____ U.S. _____, 116 S.Ct. 184 (1995) and *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). The decision of the third circuit in this case to deny mandamus on that basis conflicts with the holdings of the sixth, seventh and ninth circuits and that in *Beacon Theatres*. Certiorari is necessary to resolve that very important conflict among the circuit courts of appeals and with *Beacon Theatres*.

Respondent argues that mandamus cannot overturn "previous authority of this court" (Brief in Opposition, p. 9), without citing any authority so holding. Consol buttresses that argument with the contention that the writ of mandamus was in the discretion of the Court of Appeals (*Id.*). That argument is foreclosed by the decisions of this court. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (Denial of mandamus to Defendant to obtain jury trial by third circuit reversed) and *Beacon Theatres, supra*.

II. The Jury, Not The District Court, Is The Lawful Finder Of The Facts Petitioner Seeks To Have Adopted.

The district court had independent concurrent jurisdiction of Newman's Jones Act case (Petition For Certiorari, p. 4) and the Seventh Amendment forbids the denial of his right to a jury trial merely because the court also had admiralty jurisdiction of the Limitation case. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355 (1962). The Seventh Amendment also forbids any reexamination of the facts found by the jury. *Ellerman* at 369 U.S. 358-359. "Only one trier of fact should be used for the trial" of Jones Act claims in an admiralty case. *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 21 (1963). The courts are not "free, even if [they] wished, to require submission of all the claims to the judge alone." (*Id).* The right to jury trial extends equally to a defendant asserting legal claims in a plaintiff's nonjury action (Petition For Certiorari, p. 19).

Under Consol's analysis (Brief in Opposition, p. 24) the seaman is deprived of his rights to a jury trial both if he signs the stipulation or if he refuses to stipulate, because of the Limitation Act. Congress does not have the constitutional power to take away those rights in a proceeding before an Article III court. *Granfinanciera S.A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 2795-2796 (1989). The United States District Court for the Western District of Pennsylvania is an Article III court and Judge Bloch is an Article III judge. Congress has not created a non-Article III tribunal for limitation of liability cases.

III. Consol's Statement On Page 11 Of Its Brief In Opposition That "Petitioner Expressly Stipulated That The District Court Would Have Exclusive Jurisdiction For Determining All Issues Relating To Consolidation's Complaint For Exoneration From Or Limitation Of Liability And That *No* Fact Found By A Jury In The State Court Action Would Serve As *Res Judicata* In The Present Case. Pet. A50." Is False.

As Consol says, the stipulation is printed at page 50 of the Appendix to the Petition for Certiorari. Notably absent from that stipulation is any mention of "exclusive jurisdiction" and "no fact found by a jury in the state court action." The misrepresentation is shocking and unfair to the Court and Petitioner. The false statement is a tacit admission of the truth of Newman's argument that a litigant does not waive by implication his right to jury trial. (Petition For Certiorari, pp. 21-23). Consol has attempted here to manufacture evidence of a nonexistent express waiver contrary to the record because it recognizes Newman did not waive a jury trial but instead sought at every opportunity to preserve those rights.

Consol's argument, accepted by the district court, that exclusive jurisdiction over the limitation case justifies reexamination of the facts found by the jury is wrong because it ignores the statutory jurisdiction of the Jones Act claim. The exclusive jurisdiction argument has also been repeatedly rejected by this court: *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984) (Civil rights); *Marrese v. American Ac. of Orthopaedic Surg.*, 470 U.S. 373 (1985) (Anti-trust); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (Tort).

Understandably, Consol has cited no authority for the proposition that successful efforts to obtain a jury trial result in the oxymoron that the same efforts waive those rights.

CONCLUSION

The facts found by the jury that Newman seeks to have adopted as the foundation for this Limitation of Liability case are the result of the American constitutional, legislative and legal systems. The Seventh Amendment assures litigants that those facts will not be reexamined. The same Amendment and the Jones Act guaranteed Newman the right to a trial by jury, which has already been held. No statute or rule guaranteed Consol any right to a nonjury trial in the limitation case. Those facts should be adopted as the beginning facts in this Limitation of Liability case and Certiorari should be granted to reverse the denial of mandamus and remand with instructions to adopt the facts found by the jury and proceed with the litigation on those facts. In the alternative, although Newman believes he has a Seventh Amendment right not to have the facts reexamined, if there is to be such an examination, the writ should issue to compel that reexamination be done before a jury.

Respectfully submitted,

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